Re Maheswary Ramasamy; ex p BSN Commercial Bank (M) Bhd

HIGH COURT (SHAH ALAM) — BANKRUPTCY SUIT NO 29-1500 OF 1998
LOW HOP BING J
30 AUGUST 2001

Bankruptcy *— Practice and Procedure — Appeal — Defective notice of appeal — Reference to wrong legislation — Failure to file Form 16 or Form 7 — Whether appeal fundamentally flawed — Bankruptcy Rules 1969 rr 18, 95(1) & 117*

The appellant ('judgment debtor') filed a notice of appeal to appeal against the whole of the decision of the registrar ordering that the appellant's application be dismissed with costs. Neither the appellant nor the respondent ('judgment creditor') mentioned the defects in the appellant's notice of appeal in their written submissions. The written submissions of both parties specifically stated that the appeal was against the learned registrar's decision dismissing the judgment debtor's application under 'rr 117 and 18 of the Bankruptcy Act 1967' ('the Act'). These rules were to be found under the Bankruptcy Rules 1969 ('the Rules'), and not the Act. Nevertheless, the court proceeded to consider the appellant's notice of appeal on the basis that the appeal was proceeded with in the light of rr 117 and 18 of the Rules.

Held, dismissing the appeal:

Rule 117 of the Rules specifically required the use of Form 16 in Appendix to the Rules where a debtor, such as the judgment debtor herein, intended to show cause against a creditor's petition. Upon a careful perusal of the cause papers in the matter, the court could not find any Form 16. It was only reasonable to conclude that learned counsel for the judgment debtor had never filed Form 16 as specifically required under r 117, in which case there was no application for the judgment debtor under r 117 (see p 353H–I). The only conclusion that could be drawn in this appeal was that there was no application by the judgment debtor under either r 117 (which must be by way of a notice in Form 16) or r 18 (which contained exceptions, one of which was specifically to be found in r 95(1), which must be by way of an affidavit in Form 7). Therefore the notice of appeal, being fundamentally flawed, and therefore incompetent, was hereby struck out *in limine* (see p 355A–B).

[Bahasa Malaysia summary

Perayu ('penghutang penghakiman') telah memfailkan satu notis rayuan untuk merayu terhadap keseluruhan keputusan pendaftar yang memerintahkan supaya permohonan perayu ditolak dengan kos. Kedua-dua perayu dan responden ('pemiutang penghakiman') tidak menyebut kecacatan dalam notis rayuan perayu di dalam hujahan

bertulis mereka. Hujahan-hujahan bertulis kedua-dua pihak secara khususnya menyatakan bahawa rayuan tersebut adalah terhadap keputusan pendaftar yang arif yang menolak permohonan penghutang penghakiman di bawah 'kk 117 dan 18 Akta Kebankrapan 1967' ('Akta tersebut'). Kaedah-kaedah ini terdapat di bawah Kaedah-Kaedah Kebankrapan 1969 ('Kaedah-Kaedah tersebut'), dan bukannya Akta tersebut. Namun begitu, mahkamah terus mempertimbangkan notis rayuan perayu atas dasar bahawa rayuan tersebut telah diteruskan mengikut kk 117 dan 18 Kaedah-Kaedah tersebut.

Diputuskan, menolak rayuan tersebut:

Kaedah 117 Kaedah-Kaedah tersebut secara khususnya memerlukan penggunaan Borang 16 dalam Apendiks kepada Kaedah-Kaedah tersebut di mana penghutang, seperti penghutang penghakiman di sini, berniat untuk menunjukkan sebab terhadap petisyen pemiutang. Setelah meneliti dengan penuh hemat akan kertas-kertas guaman dalam perkara tersebut, mahkamah tidak dapat menemui sebarang Borang 16. Adalah hanya wajar untuk memutuskan bahawa peguam yang arif bagi pihak penghutang penghakiman tidak pernah memfailkan Borang 16 seperti mana yang secara khususnya diperlukan di bawah k 117, dalam keadaan yang mana tidak terdapat permohonan untuk penghutang penghakiman di bawah k 117 (lihat ms 353H–I). Satu-satunya kesimpulan yang boleh dicapai di dalam rayuan ini adalah bahawa tidak terdapat permohonan oleh penghutang penghakiman di bawah sama ada k 117 (yang mana mesti melalui notis di dalam Borang 16) atau k 18 (yang mana mengandungi kekecualian, salah satu daripadanya adalah secara khususnya harus didapati dalam k 95(1), yang mana semestinya melalui satu afidavit dalam Borang 7). Oleh itu notis rayuan tersebut, kerana jelas tercemar, dan oleh itu tidak kompeten, adalah dengan ini dibatalkan *in limine* (lihat ms 355A–B).]

Notes

For cases on procedures governing an bankruptcy appeal, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1925–1929.

Legislation referred to

Bankruptcy Act 1967
Bankruptcy Rules 1969 rr 18, 95(l), 117

Hariharan Kuppusamy (*Hari Haran & Co*) for the judment debtor.
Evelina Appaduray (*EJ Appaduray & Co*) for the judgment creditor.

Low Hop Bing J: The notice of appeal dated 19 November 1999 (filed by the appellant judgment debtor) in encl 21 reads as follows:

AMBIL PERHATIAN bahawa penghutang penghakiman yang dinamakan di atas bercadang hendak merayu terhadap keseluruhan keputusan oleh pendaftar yang diberikan pada 18 November 1999 memerintahkan bahawa permohonan penghutang penghakiman di bawah kk 117 dan 18 Akta Kebankrapan 1967 ditolak dengan kos.

[Translation: TAKE NOTICE that the abovenamed judgment debtor intends to appeal against the whole of the decision of the registrar given on 18 November 1999 ordering that the judgment debtor's application under rr 117 and 18 of the Bankruptcy Act 1967 be dismissed with costs.]

The written submissions filed for the judgment debtor and the judgment creditor respectively made no mention of the defects found in this notice of appeal, which specifically stated that the appeal was against the learned registrar's decision dismissing the judgment debtor's application under 'rr 117 and 18 of the Bankruptcy Act 1967' ('the Act'). At first glance, it is not difficult to identify the fundamental flaws manifested therein. Any learned member of the Bar would not fail to learn that the Act contains 'sections' rather than 'rules'. It is therefore not surprising that rr 117 and 18 could not be found in the Act. What can be found in the Act are ss 117 and 18, respectively providing for 'prosecution for offences', and 'powers for creditors to accept and courts to approve composition or arrangement'. That being the case, the judgment debtor's application expressed to be 'under rr 117 and 18 of the Act' in the said notice of appeal was not the application which was properly, accurately or correctly stated. The error contained in the said notice of appeal is so substantial and fundamental as to render the said notice of appeal defective, since the application stated therein could not be identified, and indeed was non-existent in the file before me. Be that as it may, it is possible that the learned counsel for the judgment debtor has mistaken the Act for the Bankruptcy Rules 1969 ('the Rules') wherein the rules regulating bankruptcy matters are explicitly contained. I shall therefore proceed to consider the said notice of appeal on the basis that the appeal is proceeded with in the light of rr 117 and 18 of the Rules. Rule 117 thereof provides for the procedure by which a debtor may proceed to show cause against a creditor's petition and reads as follows:

Debtor intending to show cause

Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor, if known, a copy of the notice three days before the day on which the petition is to be heard.

Rule 117 specifically requires the use of form 16 Appendix to the Rules where a debtor, such as the judgment debtor herein, intends to show cause against a creditor's petition. Upon a careful perusal of the cause papers in the matter before me, I could not find any form 16. It is only reasonable to conclude that learned counsel for the judgment debtor has never filed form 16 as specifically required under r 117, in which case there is no application for the judgment debtor under r 117.

Rule 18 was expressly stated in the said notice of appeal. Rule 18(1) sets out the general procedure to be followed in every application to the court. Two exceptions are expressly provided under r 18(1). For completeness, the entire provision of r 18(1) and (2) are reproduced as follows:

> Applications to be made by summons in chambers
>
> (1) Except where these Rules or the Act otherwise provide, every application to the court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.
>
> (2) Notwithstanding sub-rule (1), where applicable, all applications filed by way of motion before the commencement of these Rules may be heard by the Registrar as if they were applications made under such Rules.

However, only r 18(1) above is relevant here.

As alluded to above, the proper construction to be placed on r 18(1) is that, as a general rule, every application to the court shall be made by summons in chambers supported by affidavit. However, two exceptions are inherent in r 18, viz:

> (a) where the Bankruptcy Rules or the Bankruptcy Act otherwise provide, in which case, the specific mode of application under the said Rules or Act would apply; and
>
> (b) where the Chief Justice [now the Chief Judge] otherwise directs, in which case that specific direction would apply.

What transpired in the matter before the learned registrar and also on appeal to me was that learned counsel for the judgment debtor has filed encl 19 by way of summons in chambers to set aside the bankruptcy notice dated 12 May 1998, and creditor's petition dated 11 March 1998. This procedure adopted by learned counsel for the judgment debtor appears to have contravened the express provisions of r 95(1) of the Rules. Rule 95(1) provides for the application to set aside a bankruptcy notice and is couched in the following words:

> Application to set aside
>
> (1) The filing of an affidavit shall operate as a application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor an their respective solicitors, if known.

The correct and specific procedure for an application to set aside a bankruptcy notice is by way of an affidavit in form 7, and not by way of summons in chambers in encl 19.

Further, the judgment debtor's application by way of summons in chambers to set aside the creditor's petition is manifestly erroneous. It has been clearly provided for in r 117, and an application to set aside a creditor's petition is indeed to show cause against the petition, and should be done by filing a notice in form 16 with the registrar, specifying the statements in the petition which he intends to deny or dispute, and transmit by post or otherwise to the petitioning creditor and his solicitor, if known,

a copy of the notice three days before the day on which the petition is to be heard.

The only conclusion that can be drawn in the appeal before me is that there was no application by the judgment debtor under either r 117 (which must be by way of a notice in form 16) or r 18 (which contains exceptions, one of which is specifically to be found in r 95(1), which must be by way of an affidavit in form 7). I therefore hold that the said notice of appeal, being fundamentally flawed, and therefore incompetent, is hereby struck out *in limine*.

This is sufficient to dispose of this appeal before me.

As learned counsel for the respective judgment debtor or the judgment creditor has not addressed me on the above issues, I make no order as to costs in respect of this appeal.

Appeal dismissed.

Reported by Wong Ee Lynn